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IN THE

Supreme Court of the United States

October Term, 1960

No. 54

CARL BRADEN,

Petitioner,

vs.

UNITED STATES.

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the Court of Appeals (R. 112-124) is reported at 272 F. 2d 653. The order denying rehearing was entered without opinion (R. 128). There were no opinions in the District Court.

Jurisdiction

The judgment of the Court of Appeals was entered on December 10, 1959 (R. 124). A petition for rehearing was denied on January 12, 1960 (R. 125). On February 2, 1960, Mr. Justice Black extended the time to file a petition for certiorari to March 12, 1960 (R. 148). The petition for certiorari was filed on March 10, 1960, and was granted on April 25, 1960 (R. 149). The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

Questions Presented

The petitioner was convicted of refusing to answer six questions of a congressional committee relating to his activities in furtherance of racial integration in the South, to his possible connection with a civil liberties organization, to his participation in a petition to the Congress, and to his possible relationship to a newsletter. The questions presented by his conviction are as follows:

1. Whether the First Amendment barred the committee from inquiring into petitioner's political and journalistic activities unrelated to possible overthrow of the government.

2. Whether the questions were pertinent to the inquiry, whether their pertinency had been explained to petitioner, and whether the issue of pertinency should have been left to the jury.

3. Whether there was a valid legislative purpose in the questions put to petitioner.

4. Whether the legislative authority for the committee's inquiry, as applied to the questions put here, is not too vague to serve as a basis for criminal prosecution.

5. Whether petitioner's refusal to answer was wilful in view of the fact that he relied upon the decision of this Court in *Watkins* v. *United States*.

Constitutional Provisions, Statutes and Rules Involved.

The constitutional provisions involved are the First, Fifth and Sixth Amendments.

The statutes involved are 2 U. S. C. § 192 (52 Stat. 942), as amended, Public Law 601, Section 121, 79th Cong., 2d Sess. (60 Stat. 828) and the relevant portions of Rule XI of the Rules of the House of Representatives, H. Res. 5, 85th Cong., 1st Sess. These statutes and the Rule are reproduced in Appendix A, *infra*, p. 48.

Statement of the Case

In the course of testimony before the House Committee on Un-American Activities, the petitioner was asked and refused to answer the following six questions (R. 4-5):

> "And did you participate in a meeting here at that time?
>
> "Who solicited the quarters to be made available to the Southern Conference Educational Fund?
>
> "Are you connected with the Emergency Civil Liberties Committ ?
>
> "Did you and Harvey O'Connor, in the course of your conference there in Rhode Island, develop plans and strategies outlining work schedules for the Emergency Civil Liberties Committee?
>
> "Were you a member of the Communist Party the instant you affixed your signature to that letter?
>
> "I would just like to ask you whether or not you, being a resident of Louisville, Kentucky, nave anything to do there with the Southern Newsletter?"

Thereafter, petitioner was convicted on six counts, each charging a wilful refusal to answer a proper question, in violation of 2 U. S. C. § 192. The issue in this Court is whether petitioner's conviction was justified.

Petitioner was a field secretary of the Southern Conference Educational Fund (herein the "Southern Conference") (R. 90). He was also associate editor of its newspaper, the Southern Patriot, "a paper that disseminates information on integration in the South and about the people who are working for integration" (R. 90). He had previously served in various capacities as a journalist for daily

and labor newspapers (R. 90). He had also devoted himself to the cause of integration.[1]

Prior to the Committee hearing, held at Atlanta, petitioner and his wife, who was also a field secretary of the Southern Conference (R. 108), signed a letter on the letterhead of the Southern Conference, which urged their fellow citizens to write their Senators and Congressmen to oppose three bills that would "nullify . . . a Supreme Court decision declaring state sedition laws inoperative. We know from our own experience how such laws can be used against people working to bring about integration in the South" (R. 107-108).

Similarly, prior to his appearance, two hundred prominent Negro leaders petitioned Congress against the announced Atlanta investigation of the House Committee on Un-American Activities, *infra*, p. 8 (R. 98-99). The Committee attributed to petitioner the preparation of that petition (R. 29). Its counsel criticized the petition as being

> "for the purpose of precluding or attempting to preclude or softening the very hearings which are proposed to have here" (R. 29).

---

[1] In 1954 petitioner and his wife were indicted and he was convicted of sedition in Kentucky, as a direct result of helping a Negro family to purchase a house in a segregated suburb of Louisville. See Anne Braden, *The Wall Between* (1958).

The House Committee supplied the State prosecuting attorney with advice and nine of his key witnesses. See Transcript of Evidence filed as part of Record on Appeal in *Braden* v. *Commonwealth*, 291, S. W. 2d 843 (Kentucky C. A., 1956) pp. 43-157, 433-533, 547-768, 830-857, 866-881, 955-1009, 1019-1054, 1108-1133, 1138-1143, 1167-1200, 1210-1230, 1368, 1473-1474. The charges against petitioner and his wife were subsequently dismissed, *Braden* v. *Commonwealth*, *supra*, following this Court's decision in *Pennsylvania* v. *Nelson*, 350 U. S. 497. As a result of harassment and prosecution resulting from his integration efforts in Louisville, petitioner was unemployed before assuming his post with the Southern Conference in 1957 (R. 90).

On July 30, 1958 petitioner was called as a witness by the Committee on Un-American Activities (R. 89). The subpoena was served upon him while he was vacationing at the seashore home in Rhode Island of Mr. Harvey O'Connor, a writer, and National Chairman of the Emergency Civil Liberties Committee, an organization concerned with the protection of civil liberties (R. 89, 91, 106).

Proceedings Before the House Committee

The authorization for the House Committee on Un-American Activities appears in Rule XI of the Rules of the House of Representatives, which in pertinent part reads as follows:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

The hearings to which petitioner was subpoenaed were directed by resolution of the full Committee to be held on the following subjects:

> "1. The extent, character and objects of Communist colonization and infiltration in the textile and other basic industries located in the South, and Communist Party propaganda activities in the South, the legislative purpose being:
>
> (a) To obtain additional information for use by the Committee in its consideration of Section 16 of H. R. 9352, relating to the proposed amendment of Section 4 of the Communist Control Act of 1954, prescribing a penalty for knowingly and

wilfully becoming or remaining a member of the Communist Party with knowledge of the purposes or objectives thereof; and

(b) To obtain additional information adding to the Committee's overall knowledge on the subject so that Congress may be kept informed and thus prepared to enact remedial legislation in the National defense, and for internal security, when and if the exigencies of the situation require it.

"2. Entry and dissemination within the United States of foreign Communist Party propaganda, the legislative purpose being to determine the necessity for, and advisability of, amendments to the Foreign Agents Registration Act designed more effectively to counteract the Communist schemes and devices now used in avoiding the prohibitions of the Act.

"3. Any other matter within the jurisdiction of the Committee which it, or any subcommittee thereof, appointed to conduct this hearing, may designate." (R. 137-138)

The hearings opened on July 29, 1958 with a statement by the Committee's Chairman, Congressman Francis E. Walter, that the Committee was

"accumulating factual information respecting Communists, the Communist Party and Communist activities which will enable the Committee and the Congress to appraise the administration and operation of the Smith Act, the Internal Security Act of 1950, the Communist Control Act of 1954, and numerous provisions of the Criminal Code relating to espionage, sabotage and subversion. In addition, the Committee has before it numerous proposals to strengthen our legislative weapons designed to protect the internal security of this Nation." (R. 86)

Petitioner was called on the second day of the hearing (R. 89). Under examination by Richard Arens, Committee counsel, petitioner described the nature of his work, his background in journalism and his education (R. 90).

After stating where the Committee's subpoena had been served upon him, petitioner was asked to give "your immediate point of departure before you arrived in Rhode Island" (R. 91). Mr. Arens made an extensive statement purporting to explain to petitioner the pertinency of the question (R. 91-93). This in essence amplified Chairman Walter's statement, quoted above, and asserted the Committee's "understanding" that petitioner was a member of the Communist Party (R. 91). At the close of petitioner's testimony, Mr. Arens disclosed another reason for the questions. He said:

> "We may desire eventually to consider a citation of the Southern Conference Educational Fund on the basis of the information which we are now and elsewhere developing" (R. 110).

At the trial Mr. Arens said that the Committee also sought information to determine whether to "cite" the Emergency Civil Liberties Committee, of which petitioner's Rhode Island host, Mr. O'Connor, was chairman (R. 33). "Citation", it was made plain, meant a citation of the organization by the Committee as a so-called "Communist front" organization (R. 109-110).

Petitioner did not answer the question concerning the point of his departure to Rhode Island (R. 93) nor did he answer a number of other questions, including some questions not covered by the indictment. He justified his refusals by reference to his First Amendment rights, and by asserting the lack of pertinency of the questions to any legislative purpose (R. 91, 93, 94, 95, 99, 102, 105), the "same grounds" being given by him during the latter portion of his questioning (R. 102, 105, 106, 108). Early in the hearing he stated:

> "• • • I am standing on the Watkins, Sweezy, Konigsberg and other decisions of the United States Supreme Court which protect my right, and the Constitution as they interpret the Constitution of the United States, protecting my right to private belief and association." (R. 95)

Petitioner was asked about his connection, if any, with a petition to the House of Representatives signed by two hundred Negro leaders in the South, objecting to the then imminent Atlanta hearings of the House Committee. *Supra* p. 4. The petition expressed alarm at the Committee's coming to the South

> "trying to attach the 'subversive' label to any liberal white Southerner who dares to raise his voice in support of our democratic ideals . . . [I]f white people who support integration are labeled 'subversive' by Congressional committees, terror is spread among our white citizens and it becomes increasingly difficult to find white people who are willing to support our efforts for full citizenship."

The petition requested Congressmen

> "to use your influence to see that the House Committee on Un-American Activities stays out of the South—unless it can be persuaded to come to our region to help defend us against those subversives who oppose our Supreme Court, our Federal policy of civil rights for all, and our American ideals of equality and brotherhood." (R. 98-99)

The letter was dated July 22, 1958, which was also the date of the issuance of petitioner's subpoena (R. 99).

Congressman Jackson, a Committee member, referring to its signers, charged that "[t]heir interest and major part [sic] does not lie with honest integrity" (R. 97). He added later "that there may conceivably be some of those who signed the letter who did not realize that it was sponsored by a Communist front" (R. 109); he offered them the opportunity "to withdraw their names from that letter, before it becomes a part of the official archives of our Committee on Un-American Activities" (R. 109). Petitioner's attempts to discuss the Southern Conference were blocked by the Committee (R. 105, 109), which likewise prevented him from answering Congressman Jackson's charges against it. The justification was that the Congress-

man was "not making charges. He is making a statement for the record" (R. 109).

Mr. Arens inquired as to a December, 1957 meeting of the Southern Conference and, on the previously stated grounds, petitioner refused to answer (R. 102). This was the first of the six questions charged in the indictment:

> "And did you participate in a meeting here at that time?" (Count 1, R. 102).

However, the pertinency to the subject under inquiry of this question and the questions in Counts Two and Five, also dealing with the Southern Conference, was not explained to petitioner.

Mr. Arens produced pictures of petitioner and his wife entering the building of the American Red Cross in Atlanta together with other persons, including Mr. Aubrey W. Williams. Mr. Williams is publisher of the Southern Farm and Home and was Director of the National Youth Administration in the Roosevelt administration (R. 104). Mr. Arens then asked the next question embraced in the indictment (R. 3-5):

> "Who solicited the quarters to be made available to the Southern Conference Educational Fund?" (Count 2; R. 105).

Mr. Arens next sought to determine whether petitioner was connected with the Emergency Civil Liberties Committee, the organization headed by his host at Rhode Island. Two of these questions were the basis of the next two counts of the indictment:

> "Are you connected with the Emergency Civil Liberties Committee?" (Count 2; R. 106) and
>
> "Did you and Harvey O'Connor, in the course of your conferences there in Rhode Island, develop plans and strategies outlining work schedules for the Emergency Civil Liberties Committee?" (Count 4; R. 106).

Committee counsel had earlier referred to Mr. O'Connor as having been

> "* * * identified as a hard-core member of the Communist conspiracy, head of the Emergency Civil Liberties Committee, and another organization that has been cited by a congressional committee as a Communist front" (R. 93).

No further explanation, however, of the pertinency of these two questions to the subject under inquiry was given to petitioner.

Mr. Arens then charged that petitioner, as a representative of the Southern Conference, had "promoted, stimulated, political pressure or attempted political pressure, on the United States Congress with reference to security measures pending in the Congress" (R. 106). This was a reference to the letter by petitioner and his wife on the letterhead of the Southern Conference, which asked their fellow citizens to oppose certain bills. The Committee's counsel then inquired:

> "Were you a member of the Communist Party the instant you affixed your signature to that letter?" (Count 5; R. 108).

Finally, Mr. Arens turned to the subject of the Southern Newsletter, a publication. He explained that one Feldman, "identified as a Communist", who lived in Chicago, was its editor, and that an application had been made on its behalf for a post office box in Louisville, petitioner's community (R. 108). Mr. Arens asked:

> "I would just like to ask you whether or not you, being a resident of Louisville, Kentucky, have anything to do there with the Southern Newsletter?" (Count 6; R. 108).

For his failure to answer these six questions petitioner was cited for contempt (R. 142-148).

Proceedings in the District Co

Petitioner was indicted on December 2, 1958 under 2 U. S. C. §192 by a grand jury in the United States District Court, Northern District of Georgia, Atlantic Division (R. 3). He pleaded not guilty and moved to dismiss the indictment and for a bill of particulars (R. 5-6). The motion to dismiss the indictment was denied (R. 8). A bill of particulars described the subject matter of the investigation as follows:

> "'The extent, character and objects of Communist colonization and infiltration in the textile and other basic industries located in the South, Communist Party propaganda activities in the South, and entry and dissemination within the United States of foreign Communist Party propaganda.'" (R. 7)

Petitioner was tried on January 22, 1959 before District Judge William B. Sloan and a jury. Mr. Arens was the Government's only witness (R. 20). He testified that the Committee, in conducting its hearing, was seeking information with which it could consider certain legislative proposals, which he described as follows:

> "A. One of the proposals which was then pending before the committee was in the form of a bill known as H. R. 9937 which, among other things, contained provisions undertaking to meet issues created by the Yates case, namely, the construction or interpretation of the word 'organizing'. If you want me to, I can give you a little further explanation of that, what was meant by organizing within the framework of the Smith Act.
>
> Q. What about the Foreign Agents Registration Act? A. Well, within the purview of H. R. 9937 there were provisions which would have amended the Foreign Agents Registration Act. It would have amended the Smith Act. It would have amended the Immigration and Nationality Act. It would have amended a number of acts, the Internal Security Act being the principal, and it would have amended by

that bill in a number of particulars all dealing with communistic activities, communistic techniques, communist dissemination of propaganda." (R. 26)

Over objection by defense counsel, on hearsay grounds, he stated the Committee's "information" concerning Mr. Braden, which prompted the issuance of the subpoena:

> "A. First of all it was our information that Mr. Braden was a member of the Communist Party, that he was engaged as a communist with an organization known as the Southern Conference Educational Fund which was the subject of investigation by the Internal Security Subcommittee which found in essence that the Southern Conference Educational Fund was for all intents and purposes the successor organization to the Southern Conference for Human Welfare which had been cited as a communist front. We had the information that Mr. Braden was a field representative for the Southern Conference Educational Fund. In that capacity he was going over the Southland covering a number of states setting up meetings, disseminating communist propaganda, doing communist work in the South. It was also our information that Mr. Braden was a contributor, a writer for a publication circulating in the South under communist auspices known as the Southern News Letter, the driving or leading persons of which were known communists. It was our information that Mr. Braden had in the period of time, a short time prior to the time he was actually subpoenaed or a subpoena was issued for his appearance, had left Louisville, Kentucky, which was his home, had then been on a tour in furtherance of Communist Party objectives at the behest and direction of the Communist Party. He had been there in Atlanta and he had been to New Orleans and that he was then enroute to confer with another communist by the name of Harvey O'Connor who was a leading figure and is now a leading figure in another organization controlled by the conspiracy known as the Emergency Civil Liberties Committee. That conference was scheduled to take place and did take place some place in Rhode Island. There are other

collateral and incidental factual items which we had, but I have given you the highlights." (R. 27-28)

The Assistant United States Attorney then inquired "Do you have any information relative to any specific letter or letters which Mr. Braden was circulating or purported to have circulated?" (R. 28).

The witness' answer was as follows:

> "My recollection could well be refreshed by the record itself, but in essence it was at least one of the letters, one of the letters was a letter signed by Mr. Braden and another person urging congressional action of some kind. My recollection isn't too vivid on the exact contents of it, but one of the letters that I have in mind on that appears in the record some place. In addition to that, within this record it appears on page 18 of the record of United States Exhibit No. 9. In addition to that, it was our information that Mr. Braden, and again my recollection is not absolutely clear, but it is in general that he had something to do with the preparation and dissemination of petitioners (sic; petitions?) which were circulated in the Southland for the purpose of precluding or attempting to preclude or softening the very hearings which we proposed to have here" (R.28-29).

Mr. Arens also stated in respect to petitioner that:

> "It was my information that as a communist he in concert with at least one other person who was a communist had been in Atlanta in December of the preceding year at which time he was engaging in communist activities, part of which was to penetrate known (*sic*) communist organizations which was then a technique that we were undertaking to gain information about" (R. 30-31).

With respect to Mr. O'Connor, Mr. Arens stated:

> "Yes, sir, it was our information that he was a communist, a member of the Communist Party and

in that capacity he served as the principal officer of the Emergency Civil Liberties Committee" (R. 31).

With respect to the Southern Newsletter, Mr. Arens stated:

> "It was our information that the Southern News Letter was communist controlled, that the man who had the principal office in it, whether he was the editor or publisher, I don't know, a man by the name of Eugene Feldman, was a communist identified repeatedly as a communist, that Mr. Braden as a communist was a participant in the affairs of the Southern News Letter and we suspected, although we did not know, that Mr. Braden in addition to contributing to the Southern News Letter had something to do with the distribution of the Southern News Letter because there was a post office box number in Louisville where Mr. Braden lived to which the Southern News Letters were sent and from which we suspected they were redistributed, that one of the things that we wanted to elicit and attempted to elicit from Mr. Braden was his participation in that particular enterprise." (R. 31)

He also said that the type of information carried by the Southern News Letter was "Basically communist propaganda" (R. 32).

No facts were offered by the Government to support the conclusions set forth above. It did not establish or indicate the basis of Mr. Arens' information as to petitioner's membership in the Communist Party. On cross-examination Mr. Arens was vague as to the Southern Newsletter, stating merely that "you open it up as you would a leaflet, a pamphlet" (R. 35).

On the subject of the Emergency Civil Liberties Committee, Mr. Arens stated that one of his inquiries was "to determine whether or not the Committee on Un-American Activities would or should cite it. It has been cited by

the Senate Internal Security Subcommittee. Our particular committee has not cited it as yet" (R. 36).

He acknowledged that the Southern Conference "did participate in the integration movement" (R. 36) and stated that "It was our information then as it is now that the Communist (*sic*) including Mr. Braden as a Communist, were using the integration movement as a facade for Communist Party purposes" (R. 36). No facts were offered to support this conclusion.

Following Mr. Arens' testimony, and the reading of excerpts from the Atlanta hearings, counsel for the defendant moved for a judgment of acquittal which, after extended argument, was denied by the Court (R. 55). The matter was then argued to the jury and the Court delivered a charge (R. 66-75) to which the defendant excepted (R. 75). The jury rendered a verdict of guilty. The defendant made motions to arrest judgment and for a new trial, and the motions were denied (R. 76-78-79).

Proceedings in the Court of Appeals

After an appeal, the Court of Appeals for the Fifth Circuit affirmed the conviction of petitioner (R. 112-124).

Rejecting petitioner's claim that he had been called before the Committee not "for any legislative purpose, but rather for the purpose of harassing and opposing him because of his support of integration and civil rights and his opposition to the Committee and to pending legislation", the Court said that:

> "Legislative purposes might well be furthered by a determination of whether organizations ostensibly active in championing timely objectives, such as integration and civil rights, are in fact being used for the spread of the propaganda of a foreign dominated Communist organization with subversive designs upon our governmental system" (R. 118).

The Court also made reference to the "close relationship shown between the appellant and Harvey O'Connor, who was known to the Committee as a hard-core member of the Communist Party" (R. 118). It did not indicate any record support for this statement. It concluded, however, that since the Emergency Civil Liberties Committee "was stated to be a Communist front organization", its activities "with which the appellant would have been familiar if he was associated with O'Connor in the development for it of plans and strategies, were pertinent to the investigation being made by the Committee" (R. 119).

The Court held that the first four counts were pertinent to the subject matter of the inquiry and stated "We need not make any analysis of the pertinency of the questions upon which other grounds of the indictment were based" (R. 119). It rejected petitioner's claim "that the pertinency issues should have been submitted to the jury" (R. 121). It rejected his claim that he had a right to rely upon the *Watkins* decision, and that House Rule XI authorizing the Committee (R. 129-130) "was so vague and ambiguous that it could have no constitutional validity" (R. 124). A petition for rehearing was denied by the Court of Appeals (R. 125, 128).

Summary of Argument

1. The constitutional issue presented is how far a Congressional Committee may go in investigating a private citizen's political and journalistic activities not shown to have any connection with Communism. In *Barenblatt* v. *United States* this Court held that, despite objections based upon the First Amendment, a congressional committee may investigate the danger of overthrow of the Government, and that the Communist Party is so closely related to overthrow that a committee may ask a witness about past and present membership. In the present case, however, five of the six questions had no relationship to Communism, much less to overthrow. The remaining question involved Communist Party membership but only in the context of an inquiry into a petition directed to Congress, rather than an investigation of the Communist Party. Under this Court's rulings, questions subjecting beliefs and associations to compulsory exposure and publicity infringe the First Amendment unless justified by an overbalancing public interest. Since here no connection between the questions and possible overthrow was shown, no public interest justified the invasion of constitutionally protected fields. Accordingly, the questions were beyond the constitutional power of Congress.

2. Under 2 U. S. C. § 192 it was necessary to prove that the questions put to petitioner were pertinent to the subject under inquiry, which was Communist Party propaganda activities in the South. This the Government failed to do, as demonstrated in Point 1. Nor was the pertinency of the questions validly explained to petitioner. Moreover, the District Court erred in failing to submit the issue of pertinence to the jury. As an element of the crime, pertinency should not have been passed upon as a matter of law here, since evidence *aliunde* was introduced to establish it.

3. The questions put to petitioner were not in aid of any proper legislative purpose. The principal subject of the hearing was "colonization" by the Communist Party, apparently a term used to describe the spreading of propaganda to employees in a plant, industry or organization. Neither the chief witness on the subject, an undercover F. B. I. agent, nor any other witness at the hearings named petitioner as a member of the Communist Party or linked him to the Communist Party, or indicated any relationship between petitioner and the organizations or publication about which questions were put to him. The Committee sought to justify the calling of petitioner by the assertion that it was seeking (1) to investigate "political pressure" on the Congress—actually, criticism of the Committee by petitioner—and (2) to investigate two organizations about which petitioner was questioned, to determine if the Committee should "cite" them. These were not proper legislative purposes.

4. As applied to the questions petitioner was asked, Rule XI purportedly authorizing the Committee's investigation was too vague to meet the standards of the criminal law. In *Barenblatt* this Court held that, by reference to legislative history, it could be said that the Rule authorized an investigation into Communism and that in this respect it was not too vague to be understood by a witness. But even under *Barenblatt* no witness could be charged with notice that the Committee's power of inquiry extended beyond the Communist Party to such topics as were under inquiry here, and the legislative history recounted in *Barenblatt* would not aid a witness in making this determination. Petitioner could not have ascertained whether the questions asked him were authorized by the Rule.

5. The element of willfulness involves deliberateness, and intent is essential if a refusal to answer is to be held criminal. Petitioner refused to answer the six questions involved here on the specific ground that they were beyond the Committee's power under this Court's decision in *Watkins* v. *United States*. Prior to *Barenblatt*, *Watkins* was widely understood to hold that the investigations of the Committee on Un-American Activities were not constitutionally authorized. A bona fide misunderstanding concerning a legal obligation to answer removes the element of willfulness, especially where petitioner relied upon a decision of the Supreme Court not yet limited by subsequent decision. No finding of criminal intent could be made here.

ARGUMENT

I

The Committee's inquiry violated the First Amendment.

This case presents the issue of how far a committee of Congress may go in investigating the political and journalistic activities of a private citizen. In *Barenblatt* v. *United States*, 360 U. S. 109, this Court held that a committee could, over objections based upon the First Amendment, require a witness to disclose present or past membership in the Communist Party.

In the present case the same committee went far beyond what was authorized in *Barenblatt* to inquire into activities completely unrelated to Communist Party membership. Petitioner brings his case to this Court in the belief that, even if such membership is a legitimate subject of inquiry, the First Amendment bars Congress from investigating and coercing the disclosure of political and associational matters unrelated to communism or over-

throw of the government, such as activities in the fields of racial integration in the South, civil liberties, petitions to the Congress, and journalistic contributions to and distribution of a newsletter.

A. The *Barenblatt* holding.

For a precise understanding of the constitutional issues here, it is necessary to turn first to this Court's decision in the *Barenblatt* case.

Barenblatt had refused to answer three questions dealing solely with his own past and present membership in the Communist Party, and also two other questions: Whether another individual was a Communist Party member (Count Three), and whether Barenblatt had been a member of the University of Michigan Council of Arts, Sciences and Professions (Count Five). 360 U. S. 114. This Court expressly declined to pass on the propriety of the latter two questions. The opinion states,

> "* * * we find it unnecessary to consider the validity of his conviction under the Third and Fifth Counts, the only ones involving questions which on their face do not directly relate to * * * participation [in] or knowledge [of alleged Communist Party activities]." 360 U. S. 115

In *Barenblatt* this Court held only that Congress had power to investigate past or present Communist Party membership. The basis of this holding was the power of Congress to investigate the danger of violent overthrow of the Government. The Court's opinion was expressly limited to authorize only investigation of the Communist Party. The Court referred to

> "the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence * * *", 360 U. S. 128,

and it held,

> "On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character." *Id.*

The Communist Party, in other words, had been found to be so closely related to the danger of overthrow of the Government that it could be investigated under the power to investigate overthrow. This special status of the Communist Party was in large part the result of judicial notice which is reflected in such decisions as *Dennis* v. *United States*, 183 F. 2d 201, aff'd, 341 U. S. 494, 509, and *American Communications Association* v. *Douds*, 339 U. S. 382, 399-400, and specific Congressional findings with respect to the Communist Party, such as the Subversive Activities Control Act of 1950, Section 2, 64 Stat. 987-989, 50 U. S. C. § 781. See 360 U. S. 128.

Barenblatt, to repeat, was based upon what the Court found to be the special and unique status of the Communist Party. Because of the "close nexus" recognized by the Court "between the Communist Party and violent overthrow of government", 360 U. S. 128, it held that "congressional investigation into 'overthrow' ", 360 U. S. 130, could validly inquire into Communist Party membership. The Court did not uphold the power of investigation in First Amendment areas except in the context of "overthrow," and, in that context, only with respect to the Communist Party itself.

It is petitioner's view that even the limited restriction upon the First Amendment rights upheld in *Barenblatt* is not constitutionally warranted. But in any event, the present case, involving investigation into activities not shown to be related to Communism, is far outside the scope of *Barenblatt*.

B. The objects of investigation in the present case.

The present indictment is based upon a refusal to answer six questions. In the resolution of the constitutional issue, it is necessary to determine whether the object of the questions was so closely related to possible overthrow of the Government as to justify invasion of First Amendment rights. Counts One and Three concern petitioner's activities in connection with the Southern Conference Educational Fund, an organization interested in social and racial problems in the South, and the Emergency Civil Liberties Committee, a national group concerned with protection of civil liberties. Counts Two and Four are similar except that they also involve the activities of persons other than the witness. Count Six was an inquiry into the witness' connection with a publication known as the Southern Newsletter (R. 4-5). None of these questions involved Communist Party membership in any way. The question in Count Five did involve Communist Party membership, but not as part of an inquiry into the Communist Party, which was the case in *Barenblatt*. The context of the inquiry in Count Five, as has been noted, was whether petitioner,

> "* * * as a field representative or field organizer of the Southern Conference Education Fund, promoted, stimulated, political pressure, or attempted political pressure, on the United States Congress with reference to security measures pending in the congress * * *" (R. 106),

by sending the letter which solicited expressions to Congress of opposition to bills validating state sedition laws. The Committee asked, not simply whether petitioner was or had been a Communist Party member, as in *Barenblatt*, but whether he was a member "the instant you affixed your signature to that letter" (R. 108).

On their face, none of the objects of investigation in the present case had the slightest relationship to overthrow of the Government, the only legitimate object of investigation.

under *Barenblatt*. It is therefore essential to determine whether there is any evidence in the record to establish such a relationship. For this purpose, we turn to the Committee's own statement of the purpose of the six questions.

C. The Committee's justification of the questions.

The general purpose of the Committee's investigation was restated by Chairman Francis E. Walter at the opening of the hearings on July 29, 1958 (R. 86-88). On July 30, at petitioner's hearing, it was once again stated by the Committee's staff director, Mr. Arens (R. 91-92). According to these statements, the Committee was studying various proposals for changes in internal security legislation, and, in that connection, the activities in the United States of the international Communist conspiracy. Mr. Arens sought to link the objectives stated by Chairman Walter and himself with the particular questions under examination here.

With respect to petitioner, Mr. Arens said at the hearing that it was the Committee's "understanding" that petitioner was a member of the Communist Party; that he had been so identified by "reputable, responsible witnesses;" that it was the Committee's "information" that petitioner had been propagating the Communist line in the South; that he had been "masquerading behind a facade of humanitarianism" and that the purpose of his activities was to further the international Communist conspiracy (R. 91-92).

The alleged links between the subject matter of the questions and Communism were also the subject of testimony by Mr. Arens at petitioner's trial. On the questions in Counts One and Two, Mr. Arens testified as quoted above, p. 12, that the Southern Conference Educational Fund had been "found" by another Congressional committee (the Senate Internal Security Subcommittee) to be "for all intents and purposes the successor organization to the

Southern Conference for Human Welfare which had been cited as a Communist front" (R. 27-28). With respect to the Emergency Civil Liberties Committee (Counts Three and Four) Mr. Arens testified that this organization had been "found" by the Senate Internal Security Subcommittee "to be a Communist front" and that his committee was determining whether there "might be sufficient quantity of information for the committee to itself cite the Emergency Civil Liberties Committee" (R. 33).

As for the letter soliciting communications to Congress, which was the subject of Count Five, Mr. Arens testified that, while everyone has a right to send letters and to petition Congress, the Committee wanted to know "what were the techniques involved [sic] by the Communist Party in procuring signatures and in disseminating the Communist Party line at the behest of the conspiratorial operation in the country" (R. 34). Finally, Mr. Arens said of the Southern Newsletter, the publication involved in Count Six, that "we knew [it] was Communist controlled and * * * was disseminating Communist propaganda * * *" (R. 34).

These allegations by Mr. Arens, however—and the record contains nothing more—do not suffice to establish the Committee's constitutional authority to compel the disclosures it here sought.

Even if the allegations had substance, and could be accepted at face value, they would not necessarily link the Committee's investigation to the Communist Party itself, much less to the overthrow of the Government. But the statements by Mr. Arens cannot, on the present record, be accepted as proof of the matters asserted. They are allegations only, mere statements of what the Committee believed to be true. No facts at all were offered in support of the allegations. It is in this setting of mere allegation and suspicion that this Court is required to determine whether the interests of national security require the surrender of First Amendment rights.

D. The Constitutional Issue.

In *Watkins* v. *United States*, 354 U. S. 178, in *Sweezy* v. *New Hampshire*, 354 U.S. 234, in *Barenblatt*, *supra*, and in *NAACP* v. *Alabama*, 357 U.S. 449, this Court set out the basic principles which govern decision here. First, the investigative power of government is subject to the limitations of the First Amendment. Second, investigation and exposure of beliefs, associations, political activities and the like constitute a restraint upon their free exercise. Third, such investigation, whether of individuals as in *Watkins*, or of organizations as in *NAACP*, is barred by the First Amendment unless the value of the investigation to the nation outweighs the injury to free speech and association. *Barenblatt*, as we previously noted, held that an investigation of Communist Party membership, as a measure of self-preservation against violent overthrow of the Government, was permissible despite the First Amendment, because of the substantial record of judicial and legislative findings concerning the Communist Party.

In the light of these principles, the constitutional issue presented by the present case is as follows:

Can a committee of Congress, purporting to act under its power to investigate overthrow of the Government, subject to investigation and exposure political and journalistic activities ordinarily protected by the First Amendment, without any more evidence to connect these activities to overthrow than the unsupported allegations that the activities are believed to be related to Communism?

In the present record there is nothing whatever to indicate that the investigation here would be of any value in protecting the nation from overthrow, and, therefore, nothing to justify the accompanying invasion of First Amendment freedoms.

To be specific, there is nothing in this record to show that the Southern Conference or the Emergency Civil Liberties Committee or the Southern Newsletter had the remotest connection with the Communist Party. There is nothing to suggest any connection between the petition to Congress and the Communist Party. Nor is there anything as to which judicial notice can be taken connecting any of these to the Communist Party.

If Congress can require answers to questions in connection with these organizations and activities, in the absence of a demonstrated and legitimate interest in the Government's securing information about them, a Congressional or state legislative committee might require any individual to expose his associations with any group or publication unpopular with the Committee and therefore an object of its suspicions—for example, the NAACP, the American Civil Liberties Union or the Carolina Israelite. Is it utterly far fetched to suggest that some committee might harbor suspicions that one of these had Communist tendencies—or even sincerely believe one to be a Communist front? Indeed, a like claim has been advanced by state investigating committees with respect to the NAACP; *Scull* v. *Virginia*, 359 U. S. 344, 350; *State of Florida* v. *Graham*, Cir. Ct. 2d Jud. Dist., Leon Cty., Fla; and the Progressive Party; *Sweezy* v. *New Hampshire, infra*, p. 28, n. 3; and by the Senate Internal Security Subcommittee against the Sane Nuclear Policy Committee and Dr. Linus Pauling.[2]

Very recently this Court held unanimously that an attempt to force the NAACP to expose itself to unfriendly scrutiny was a violation of that organization's rights under the First Amendment. *NAACP* v. *Alabama* established

[2] *Pauling* v. *Eastland*, U. S. App. D. C. No. 15963, petition for certiorari pending, Oct. Term 1960.

that, absent a legitimate state interest in obtaining information, Government cannot inquire into the private affairs of a political organization. The existence of that interest cannot be inferred from hearsay claims of prosecuting officials. Therefore, unless the committee here had a legitimate interest in making an inquiry into the affairs of the Southern Conference, the Emergency Civil Liberties Committee and the Southern Newsletter, its investigation must be held a violation of the First Amendment under *NAACP v. Alabama*.

It is our basic constitutional position that, even under *Barenblatt*, the Committee could investigate only if it demonstrated by evidence a genuine connection with overthrow in pursuing its investigation. If a committee's undisclosed information or unsupported surmise will justify an investigation, then the protection of the First Amendment, so clearly asserted in *NAACP* v. *Alabama*, must yield to any committee which thinks or says that its investigation is legitimate. We say that the narrow exception carved out in *Barenblatt* cannot be brought into operation by a congressional committee any time it thinks or says, without evidence, that there may be some relationship betwen the object of its investigation and Communism. The Committee cannot be the sole judge of what and whether it may legitimately investigate. To uphold the present conviction based upon the flimsy justifications of this record would be to allow committees to roam at will through any organization or activity. This Court's opinion in *Barenblatt* could never have meant that.

Nor can any additional support for the present investigation be gained from the Committee's assertion of "information" it had that petitioner himself was a member of the Communist Party. In the first place, there is no

evidence of such membership in the record here.[3] Secondly, even if petitioner were a Communist Party member, that fact could not justify a free-wheeling investigation into his organizations or other activities having nothing to do with the one element justifying any inquiry into them under *Barenblatt*:—*i.e.*, overthrow of the Government.

Petitioner was asked about any Communist Party membership "at the instant" he signed a letter in which he and his wife asked its recipients to write to Congress. But there was no evidence on the face of the letter (R. 107-8) revealing any Communist propaganda in it, nor was there elsewhere in the record any evidence—as dis-

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[3] There was no such testimony at the trial or at the Atlanta hearings. At petitioner's hearing Mr. Arens asked him whether a Mrs. Alberta Ahearn was in error when she testified before the Committee that while she was a member of the Communist Party she knew petitioner as a member. Testimony by Mrs. Ahearn, however, does not appear in the published Atlanta hearings (*Communist Infiltration and Activities in the South, Hearings*, 85th Cong., 2nd Sess., July 29, 30 and 31, 1958. These hearings comprise Exhibit 10 in this case. See stipulation, R. 141). Contrast the situation in *Barenblatt*, where the petitioner "had heard the Subcommittee interrogate the witness Crowley * * * and had listened to Crowley's testimony identifying him as a former member of an alleged Communist student organization at the University of Michigan while they both were in attendance there." 360 U. S. 125; *cf.* 360 U. S. 135.

And compare the situation in *Sweezy*:

> "The State Supreme Court illustrated the 'reasonable or reliable' information underlying the inquiries on the Progressive Party by quoting from a remark made by the Attorney General at the hearing in answer to petitioner's objection to a line of questions. The Attorney General had declared that he had '* * * considerable sworn testimony * * * to the effect that the Progressive Party in New Hampshire has been heavily infiltrated by members of the Communist Party and that the policies and purposes of the Progressive Party have been directly influenced by members of the Communist Party.' * * * None of this testimony is a part of the record in this case. Its existence and weight were not independently reviewed by the state courts." 354 U. S. 252, n. 13.

tinguished from hearsay claims—charging it to be such propaganda. Even under *Barenblatt*, therefore, and certainly under *Watkins* and *Sweezy*, there was no warrant for the Committee's question to petitioner concerning his status when he signed it. The right of petition would mean little if Congress could call every individual exercising the right of petition and ask him whether he was a Communist when he signed.

To sum up, then: Petitioner was here convicted for failing to answer questions not connected by any evidence with Communism, but trenching on his First Amendment rights. *Barenblatt* justified a narrow invasion of First Amendment rights for an inquiry into Communist Party membership, on the ground that the needs of national security and the danger of overthrow of the Government overbalanced the constitutional right in that instance. But where the questions infringe constitutional rights without demonstrable connection with Communism or overthrow of the Government, there is no justification for narrowing the Bill of Rights.

II

The questions were not pertinent to the subject under inquiry, and in any event their pertinency was not explained to petitioner. If pertinency were in issue, it was a matter for the jury.

It was incumbent upon the Government to prove that the six questions involved herein were "pertinent to the subject under inquiry". 2 U. S. C. § 192, *Watkins* v. *United States*, 354 U. S. at 214, *Barenblatt* v. *United States*, 360 U. S. at 123, *Sacher* v. *United States*, 356 U. S. 576, 577.

The bill of particulars recited a tripartite "question under inquiry" (R. 7), which repeated the essence of the authorizing resolution, *supra*, pp. 5-6. There was no claim

that petitioner was connected with, or that any question related to the first of its parts, "Communist colonization and infiltration" in Southern industry, or to the third, the entry and dissemination of "foreign Communist Party propaganda" (R. 7). Accordingly, the Government was required to prove pertinency to the remaining part, "Communist Party propaganda activities in the South" (*ibid.*).

We have already shown that there was no evidence of any valid link between the six questions put to petitioner and this subject of "Communist Party propaganda activities in the South" (Point I, *supra*, p. 23 ff). Certainly, "the pertinency of none of the * * * questions involved can be regarded as undisputably clear". Mr. Justice Harlan, concurring in *Sacher* v. *United States*, 356 U. S. 576, 578.

Although petitioner consistently objected on the grounds of lack of pertinency, *supra* p. 7, the pertinency of none of the questions was explained to him during his testimony as required by law. *Watkins* v. *United States*, 354 U. S. at 208-209, *Barenblatt* v. *United States*, 360 U. S. at 116, 123. While three of the questions charged here related to the Southern Conference (Counts 1, 2 and 5) nowhere was petitioner given a statement linking that organization to "Communist Party propaganda activities in the South". It was not until after the questioning had concluded (R. 109) that one Congressman asserted that the Southern Conference was a "Communist front" (R. 109), and on this point he was corrected by Committee counsel who stated that an asserted predecessor organization had been thus "cited" (R. 109-110). Thereafter, petitioner was asked no questions. Thus, he had no reason to believe, at the time that the three questions were put to him, that they were pertinent to the subject under inquiry.

Two other questions related to a possible connection with the Emergency Civil Liberties Committee and its Chairman, Harvey O'Connor whom Committee counsel described as:

> "a hard-core member of the Communist conspiracy, head of the Emergency Civil Liberties Committee, and another organization that has been cited by a congressional committee as a Communist front." (R. 93)

This very description of Mr. O'Connor, equally unsupported, was held too vague to be pertinent in *O'Connor* v. *United States*, 240 F. 2d 404. Its pertinency is not enhanced by repetition here.

Mr. Arens was equally vague on whether the "citation" had been of the Emergency Civil Liberties Committee or of "another organization". Assuming the former, *arguendo*, a mere allegation of citation by one Congressional committee does not make pertinent another committee's inquiry into the subject. Further, except in connection with the statutory system of adjudication by a quasi-judicial agency (see Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. § 781ff., as amended) the term "Communist front organization" has no meaning. *Cf. United States* v. *Lattimore*, 215 F. 2d 847, *United States* v. *Lattimore*, 127 F. Supp. 405. Neither of the two organizations involved herein has been the subject of proceedings under that statute. See R. 34.

The pertinency of the remaining question, which concerned the Southern Newsletter, as explained to petitioner, is equally dubious. The sole connection attributed to him is that the publication had a post office box in Louisville, the city of petitioner's residence (R. 108), obviously a most remote connection.

Under the circumstances, "the conditions necessary to sustain a conviction for deliberately refusing to answer questions pertinent to the authorized subject matter of a congressional hearing are wanting". *Sacher* v. *United States*, *supra*, at p. 577. The trial court was required to grant petitioner's motion for a judgment of acquittal on this ground (R. 10). Its refusal to do so was erroneous.

The trial court, moveover, compounded its error by its charge that the questions were pertinent as a matter of law (R. 70). Since it did not grant petitioner's motion for acquittal at the end of the Government's case, the issue of pertinency was for the jury, since "all the elements of the crime charged shall be proved beyond a reasonable doubt." *Christoffel* v. *United States*, 338 U. S. 84, 89. It is a jury that must determine all factual issues upon which there is any evidence though the evidence may be uncontroverted. *Hodges* v. *Easton*, 106 U. S. 408; *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 18, n. 10; *Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 408; *Ex parte Milligan*, 4 Wall. (71 U. S.) 2.

The reliance of the Court below upon *Sinclair* v. *United States*, 279 U. S. 263, as dispensing with the jury on this issue, was misplaced. That case did not involve a situation such as the present one where "evidence *aliunde* was introduced to prove pertinency",[4] *United States* v. *Orman*, 207 F. 2d 148, 156.[5]

The courts below thus erred both in their ruling that pertinency had been established and that it was not for the jury to pass upon the issue.

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[4] Such evidence was introduced by the Government's examination of Mr. Arens, R. 32 (Count 1), R. 32-33 (Count 2), R. 33 (Count 3), R. 33-34 (Count 4), R. 34 (Count 5), R. 34-35 (Count 6). He was cross-examined at R. 35-38.

[5] Cf. *Regina* v. *Goddard*, 2 F. & F. 361, 175 Eng. Rep. 1096 (N. P. 1861); *Regina* v. *Lavey*, 3 Car. & K. 26, 175 Eng. Rep. 448 (Q. B. 1850); *People* v. *Redmond*, 179 App. Div. 127, 129, 165 N. Y. Supp. 821, 823, appeal dismissed, 225 N. Y. 205, 127 N. E. 785. See *Materiality in Perjury as a Question of Law or a Question of Fact*, Leg. Doc. No. 65(G) at 22, Report N. Y. Law Rev. Comm. 303, 322 (1939); *United States* v. *Shinn*, 14 Fed. 447 (C. C. Ore. 1882); and Lillich, *The Element of Materiality in the Federal Crime of Perjury*, 35 Indiana L. J. 1 (1959).

III

The questions were not asked pursuant to a proper legislative purpose.

A Congressional committee may not subpoena a witness except for a legislative purpose. *Quinn* v. *United States*, 349 U. S. 155, 161; *McGrain* v. *Daugherty*, 273 U. S. 135, 173-174; *Kilbourn* v. *Thompson*, 103 U. S. 168, 190; *Watkins* v. *United States*, 354 U. S. 178; *Barenblatt* v. *United States*, 360 U. S. 109. See *Sweezy* v. *New Hampshire*, 354 U. S. 234.

A legislative purpose exists when a committee seeks information necessary for contemplated legislation or to oversee the governmental administration of existing legislation.

However, there may be investigations which are beyond the power of Congress. As this Court said in *Watkins*:

> "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress . . . Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." 354 U. S. 178, 187.

And in *Barenblatt*:

> "Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive. And the Congress, in common with all branches of the Government, must exercise its powers subject to the limita-

> tions placed by the Constitution on governmental action, more particularly in the context of this case the relevant limitations of the Bill of Rights." 360 U. S. 109, 111.

In *Barenblatt*, this Court, while disinclined to consider the motivation of particular Congressmen, did consider itself duty bound to determine whether a legislative purpose existed. Thus, it said:

> "* * * Having scrutinized this record we cannot say that the unanimous panel of the Court of Appeals which first considered this case was wrong in concluding that 'the primary purposes of the inquiry were in aid of legislative processes.' 240 F. 2d, at 881." 360 U. S. 109, 133.

We think that scrutiny of the record here will demonstrate that the primary purpose of the present inquiry was not in aid of legislative processes.

A. The Background of the Atlanta Hearings.[6]

In the context of the Atlanta hearings there was no legislative purpose in calling and examining petitioner. Realistically, his appearance may be said to be a "brief excursion"[7] from the main flow of the Committee's Atlanta hearings.

Thus, the principal subject of those hearings was the issue of colonization. The witness on the subject, Armando Penha, defined a "colonizer" as one

> "directed by the Communist Party to teach and spread propaganda in order to cultivate the mass workers within a plant or industry or legitimate organization." Hearings, July 29, 1958, p. 2611.

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[6] These hearings printed as *Communist Infiltration Activities in the South*, 85 Cong., 2d Sess., are the subject of a stipulation herein (R. 141), and will be referred to without use of the symbol "R."

[7] *Sacher* v. *United States*, 356 U. S. 576, 577 quoting from the same case at 99 U. S. App. D. C. 360, 367, 240 F. 2d 46, 53.

Penha stated that he was a member of the Communist Party National Textile Commission and simultaneously an undercover agent of the Federal Bureau of Investigation (*id.*). The Committee also heard individuals identified in his testimony. But neither Penha nor the other "colonizers" nor any other witnesses testified concerning petitioner. Nor was any testimony elicited from witnesses with respect to the Southern Conference or the Southern Newsletter or the Emergency Civil Liberties Committee.

Whether there was a valid legislative purpose for the Atlanta "colonization" inquiry must be gauged against the fact that four months earlier Penha had testified publicly on the same subject and named the same colonizers[8], and that for several months previously he had been "in close contact" with the Committee[9]. The public repetition of his testimony and the compulsory public appearance of persons whom he had twice named had the obvious purpose and effect of exposure.

Of the same character, basically, was the testimony of Mr. Irving Fishman, Deputy Collector of Customs. Mr. Fishman testified with respect to the third item, "foreign Communist Party propaganda" (R. 7). The legislative purpose in having him repeat testimony which he had given publicly eight times before[10] is most questionable. In any event, Mr. Fishman was not asked about petitioner, and the latter, in turn, was not charged with importing and disseminating such foreign propaganda.

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[8] Hearings before the House of Representatives Committee on Un-American Activities on Investigations of Communist Activities in the New England area, Parts 1-3, 85th Cong., 2d Sess. 2090, 2111, 2371, 2388.

[9] *Ibid.*, 2090-2091.

[10] Infra, Appendix, p. 52.

B. The Subpoena to Petitioner.

Petitioner is not required, however, to establish the non-legislative purpose of the Atlanta hearings as a whole. It is sufficient if the inquiry directed to him alone is devoid of legislative purpose. *United States* v. *Icardi*, 140 F. Supp. 383.

(i) The issuance of a subpoena to petitioner is part of a recently developing pattern of the Committee's use of its subpoena power to stifle its critics. Petitioner was examined concerning a petition to the Congress signed by "[t]wo hundred Negro leaders in the South" (R. 145) opposing its Atlanta hearings (R. 145)[11] and his association with the Chairman of the Emergency Civil Liberties Committee, an organization which has exchanged extensive criticism with the House Committee[12] (R. 33, 91-93, 106). The House Committee's Annual Report criticizes the Emergency Civil Liberties Committee specifically for its "avowed purpose • • • to abolish the House Committee on Un-American Activities and discredit the F.B.I." (1958 Annual Report, p. 34. H. Rep. 187).

Another critic of the Committee, Frank Wilkinson, was subpoenaed solely because he had come to Atlanta to express his opposition to the Committee. *Wilkinson* v. *United States*, 272 F. 2d 783, certiorari granted, Oct. Term 1960, No. 37. The Court below has held it proper for the Committee to subpoena one "engaged in aggressive opposition to the continued functioning of the Committee". *Wilkinson* v. *United States*, 272 F. 2d 783, 787.

More recently, the Committee subpoenaed Harvey O'Connor, Chairman of the Emergency Civil Liberties Committee, because he was about to deliver a public speech

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[11] The full letter appears at R. 107-108.

[12] See *e.g.* the Committee's pamphlet entitled *Operation Abolition* (Nov. 8, 1957), an attack upon its critics.

critical of the Committee (Hearings House Committee on Un-American Activities, 85th Cong. 2d Sess. on *Communist Infiltration and Activities in Newark, N. J.* (1958), pp. 2757 *et seq.*) and indicted him for failure to appear. *United States* v. *O'Connor* (D. N. J. Crim. No. 232-59). The Committee charged that Mr. O'Connor "intended nevertheless to discredit and to suggest a defiance of the Committee" (*Id.* at 2900) and that petitioner herein "had about the same things in mind, but he at least appeared" (*Ibid.*).

Lèse majesté is not a justification for a legislative inquiry. The decision below is a far cry from this Court's decision in *McGrain* v. *Daugherty*, 273 U. S. 135, and from the reasoning in Dean Landis' landmark article, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153 (1926). This case presents an issue critical to the democratic process—the extent to which Congress intended and the Constitution permits use of the subpoena power to examine the sovereign people in retaliation for their expressed criticism of certain elected officials. See *Chisholm* v. *Georgia*, 2 Dallas (2 U. S.) 419, 472; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370.

(ii) The second non-legislative purpose was to determine whether there was "sufficient quantity of information for the Committee to itself cite the Emergency Civil Liberties Committee" as a subversive organization (R. 33). Similarly, the Committee's counsel stated: "We may desire eventually to consider a citation of the Southern Conference Educational Fund on the basis of the information which we are now and elsewhere developing" (R. 110). Even if "citation" were a governmental function under our Constitution (*Cf. Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Communist Party* v. *Subversive Activities Control Board*, Oct. Term, 1960, No. 12), such a "direct condemnation by the legislature without any judicial action" [Chafee, *Three Human Rights in the Constitution* (1956) 93], is a bill of attainder completely out-

side the legislative process. See *Ex parte Garland*, 71 U. S. 333; *United States* v. *Lovett*, 328 U. S. 303.[13]

The Founding Fathers shared this view, with specific respect to an attempted legislative condemnation of political groups. In the early days of the Republic there was considerable public hostility toward the so-called "Democratic Societies," which participated in the Whiskey Rebellion in Pennsylvania and subsequently formed the bulwark of the movement behind Thomas Jefferson. Indeed, after these "self-created societies" had been roundly castigated by President Washington, Annals of Congress (3rd Cong., 2nd Sess., Nov. 1794), p. 899, it was proposed in the House of Representatives that they be censured. *Id.* Madison successfully objected, arguing, "It is in vain to say that this indiscriminate censure is no punishment * * * Is not this proposition, if voted, a vote of attainder?" *Ibid.*, p. 934. See Brant, James Madison, Father of the Constitution (1950) 417-419.

(iii) The Committee claims the right of testimonial compulsion to investigate "political pressure, or attempted political pressure, on the United States Congress with respect to security measures pending in the Congress" (R. 106).[14] This is a distortion of the constitutional relationship between the citizen and the State. It is the antithesis of the "free political discussion * * * [which is] the very foundation of constitutional government". *De*

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[13] Cf. *Methodist Federation of Social Action* v. *Eastland*, 141 F. Supp. 729, where a three-judge statutory court declined to decide the bill of attainder issue because the remedy sought was an injunction against a Government publication; see particularly the scholary dissenting opinion of Judge Wilkins, 141 F. Supp. at 732.

[14] Correspondingly, the Vice Chairman of the Internal Security SubCommittee of the Senate has been conducting hearings to determine whether the Sane Nuclear Policy Committee's statements to Congress and the public are to be discounted because of the possibility that Communists may have supported Sane. See *Pauling* v. *Eastland*, *supra*, n. 2.

Jonge v. *Oregon*, 299 U. S. 353, 365. "Un-American propaganda activities" are quite different from such "attempted political pressure"; see *United States* v. *Josephson*, 165 F. 2d 82, 87-88, cert. den. 333 U. S. 838, reh. den. 333 U. S. 858).

To read the House Committee's mandate so broadly would violate "the freedoms guaranteed by the First Amendment—freedom to speak, publish and petition the Government", *United States* v. *Harriss*, 347 U. S. 612, 625.

The only judicial support of this broad Committee power is found in the opinion below and the *Wilkinson* cases. Indeed, the Court below so clearly regarded petitioner's opposition to pending legislation as a justification for the retaliatory subpoena that it reproduced the entire letter of opposition in the opinion (R. 116). This case thus presents far more sharply and unavoidably than *United States* v. *Rumely*, 345 U. S. 41, the important issue of whether the Congress intended and the Constitution permits this punitive use of the power to subpoena and cross-examine private citizens. We submit that the answer must be in the negative.

(iv) The Committee's extraordinary claim of power to investigate petitioner's motives in supporting integration and civil rights (R. 91-92) would establish an equally pernicious limitation upon the right of citizens to associate, petition and speak, and even think. The Court below agreed with the Government that the Committee could investigate "whether organizations ostensibly active in championing timely objectives, such as integration and civil rights, are in fact being used for the spread of the propaganda of a foreign dominated Communist organization with subversive designs upon our governmental system" (R. 118).

Increasingly, since *Brown* v. *Board of Education*, 347 U. S. 483, governmental bodies have attempted such censor-

ship in the guise of registration laws and legislative investigations. See *Shelton* v. *Tucker*, Oct. Term 1960, No. 14; *National Assn. for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449; *Bates* v. *City of Little Rock*, 361 U. S. 516; Public Hearings of the State of Louisiana Joint Legislative Committee, *Subversion in Racial Unrest*, March 6-9, 1957.[15] The decision below would accomplish this very result. It is also in conflict in principle with this Court's decision in *DeJonge* v. *Oregon*, 299 U. S. 353, protecting the exercise of constitutional rights regardless of challenged auspices.

In Appendix B to this brief we have summarized factual material of public record, to show that the questioning of petitioner was part of a pattern of non-legislative activity by this Committee. The facts show that the abuse of authority here was not an isolated instance but a regular practice.

The issue thus may be viewed in the context of the entire group of Atlanta hearings whose dubious characteristics we have noted. It is unnecessary for the present, however, to decide whether the hearings as a whole lacked a legislative purpose. For as a minimum a legislative purpose must be shown in the investigation of petitioner himself. This was indisputably lacking.

IV

As a standard of criminal conduct Rule XI is fatally vague in its present application.

This Court held many years ago that Congress has inherent power to conduct investigations and to order its Sergeant-at-Arms to punish recalcitrant witnesses, *Anderson* v. *Dunn*, 6 Wheat. (19 U. S.) 204. But when Congress

[15] Other relevant material is documented in *Scull* v. *Virginia*, *supra*, Petitioner's Brief, pp. 41-75.

resorts to the courts and the processes of the criminal law to enforce penalties against a recalcitrant witness as it has done here under 2 U. S. C. § 192, it must observe the strict standards of the criminal law. Specifically, House Rule XI, treated in conjunction with 2 U. S. C., § 192, must be read as a criminal statute. *Sacher* v. *United States*, 356 U. S. 576, 577. See also *Watkins* v. *United States*, *supra*, at 208.

To be valid Rule XI must establish a standard of conduct that is not so vague and indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application". *Connally* v. *General Construction Company*, 269 U. S. 385 at 391. Vagueness is especially pernicious where, as here, First Amendment rights are involved. *Burstyn* v. *Wilson*, 343 U. S. 495.

In both *Watkins* and *Barenblatt* this Court had occasion to consider the issue of vagueness of Rule XI. In *Watkins* the Court said: "It would be difficult to imagine a less explicit authorizing resolution." 354 U. S. 202. In *Barenblatt* the Court considered the resolution in the context of an investigation of membership in the Communist Party. The Court found it necessary to look to the legislative history of the resolution in order to give it an ascertainable meaning. It referred to debates on the original authorizing resolution in the 75th Congress, to seventeen House Reports from the 76th Congress to the 85th Congress and to twenty-three House Resolutions over the same period. This legislative history, the Court held, impelled the conclusion that the Committee possessed "legislative authority to conduct the inquiry presently under consideration * * *" i.e., into Communist Party membership. 360 U. S. at 122.

Even if Rule XI may be thus understood to authorize an investigation into Communist Party membership, we think it cannot possibly be said to authorize, with the clarity essential to a criminal statute, an investigation

into political and journalistic activities which were the focus here. When petitioner was called upon to answer the six questions forming the basis of the present indictment, he had the right to know whether those questions were authorized by the House Rule. That Rule, in our opinion, does not establish with sufficient clarity the power of the Committee in this instance to investigate the Southern Conference, the Emergency Civil Liberties Committee, petitions to Congress or the Southern Newsletter. For the Rule does not specify any categories of inquiry into which these topics might fall, and there is no evidence, as has been shown, linking them or the petitioner to Communism.

Perhaps, in the light of much legislative history, a witness could be expected to know if the Committee was authorized to investigate the Communist Party, as the Court held in *Barenblatt*. But it would be difficult if not impossible for him to determine whether or not the Rule also permits the investigation undertaken here.

We say, in other words, that even if the witness Barenblatt was on notice that questions concerning the Communist Party were authorized by Rule XI, the petitioner here was not on notice that a broad-ranging inquiry into other First Amendment areas, such as the questions asked of him, were authorized.

We need only add that if the Rule were construed to cover the investigation undertaken in the present case, it would suffer from the vice of general vagueness because it would then possess well nigh unlimited scope. The Court need not reach this issue here. The point is that the Rule was too vague to permit petitioner to determine whether he was committing a crime at the time he refused to answer the six questions in the present indictment. Congress, having invoked the processes of the criminal law, cannot require a witness to guess whether or not he will be guilty of a crime when he attempts to assert his constitutional rights.

V

Petitioner's justifiable reliance on the *Watkins* ruling precluded a finding of wilfulness in his failure to answer.

Petitioner was subpoenaed in July, 1958, about a year after this Court's decision in the *Watkins* case. That decision was widely greeted as holding that the questions put to Watkins violated his rights under the First Amendment in that they constituted an unjustified invasion of his rights of free speech and free assembly. The view that the Committee could not continue to operate as it had under the then enabling resolution was held not only by responsible press opinion,[16] but also by members of Congress,[17] legal scholars [18] and members of the federal judiciary.[19]

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[16] For example, see editorials in the New York Times on June 18, 19 and 23, 1957; New York Mirror, June 18, 1957; New York Post, June 18, 1957; New York World Telegram & Sun, June 18, 1957; Washington Evening Star, June 18, 1957; The Nation, June 29, 1957, page 558; The Nation, July 20, 1957, page 26.

[17] Among many others, see the remarks of Congressmen Scherer and Jackson in the Congressional Record of June 27, 1957. Both were members of this Committee.

[18] See *e.g.* Fleischmann, *Watkins* v. *United States and Congressional Power of Investigation*, 9 Hastings L. R. 145, and *Comments* in 71 Harvard L. R. 141, 56 Michigan L. R. 272, 24 U. of Chicago L. R. 740, 33 Temple L. Q. 108, 36 North Carolina L. R. 479.

[19] Prior to the time petitioner testified, Judge Youngdahl had decided *United States* v. *Peck*, 154 Fed. Supp. 603, and a unanimous panel of the Court of Appeals for the District of Columbia had decided *Singer* v. *United States*, 247 F. 2d 535, 101 App. D. C. 129, vacating the judgment in 244 F. 2d 349, 100 App. D. C. 260.

Petitioner, in refusing to testify, explicitly relied upon this Court's decision in the *Watkins* case, among others. (R. 95). The *Barenblatt* decision, in June, 1959, came nearly a year after his appearance.

Appellant's reliance on *Watkins* negated the criminal intent required by 2 U. S. C. § 192. That section "like the ordinary federal criminal statute requires a criminal intent—in this instance, a deliberate, intentional refusal to answer". *Quinn* v. *United States*, 349 U. S. 155, 165. But there does not here exist "the element of deliberateness necessary for a conviction under Section 192 * * *" *Emspak* v. *United States*, 349 U.S. 190, 202. See also *United States* v. *Lamont*, 18 F.R.D. 27, aff'd on other grounds, 236 F. 2d 312.

A direct analogy will be found in the two *Murdock* cases, *United States* v. *Murdock*, 284 U.S. 141, and 290 U.S. 389. In the first case, this Court overruled a district court's dismissal of an indictment under §1114 (a) of the Revenue Act of 1926, based upon a refusal to give information to the Internal Revenue Bureau. The Court held that the ground of the refusal, the possibility of incrimination under state law, was insufficient.

In the second case, the Court upheld a reversal of Murdock's conviction because he had acted in good faith and therefore his refusal was not wilful. Said the Court:

> "The word [wilfully] often denotes an act which is intentional, or knowing, or voluntary as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose. * * *
>
> "The word is also employed to characterize a thing done without ground for believing it is lawful (Roby v. Newton, 121 Ga. 679, 49 S.E. 694, 68 L.R.A. 601), or conduct marked by careless disregard whether or not one has the right so to act. * * *" 290 U.S. 389 at 394-395).

* * *

> "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances must be wilful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information" (290 U. S. 389 at 396).

The analogy is further illustrated by the Court's comment upon the first *Murdock* case:

> "It follows that the respondent was entitled to the charge he requested with respect to his good faith and actual belief. Not until his court pronounced judgment in *United States* v. *Murdock*, 284 U.S. 141, had it been definitely settled that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law" (*Ibid.*).

In the second *Murdock* case, 290 U.S. at 397, the Court distinguished *Sinclair* v. *United States*, 279 U.S. 263, on which the court below here relied (R. 122). It pointed out that 2 U. S. C. § 192, under which the Sinclair prosecution (like the present prosecution) was brought, did not require wilfulness, at least in that portion of the statute relating to a refusal to answer questions. This distinction perhaps might have been a valid one until this Court, in *Emspak* and *Quinn*, *supra*, read the second part of Section 192 as including the element of wilfulness.[20]

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[20] Based upon *Emspak* and *Quinn*, District Judge Weinfeld in *United States* v. *Lamont*, *supra*, 18 F. R. D. at 32, held that "willfulness, or a deliberate intentional refusal to answer, was an essential element of the offense", to be pleaded and proved. *United States* v. *Deutsch*, 235 F. 2d 853, 98 App. D. C. 356, dispensed with a charge of willfulness in the indictment, holding the words "unlawfully refused" to connote willfulness. The present indictment, following *Lamont* rather than *Deutsch*, charges the defendant with having refused to answer "knowingly, willfully and unlawfully" (R. 4).

In any event, *Sinclair* was not a case like the present where the litigant "had a right to repose upon the decision of the highest judicial tribunal in the land", *Harris* v. *Jex*, 55 N.Y. 421, 424, discussed in Cardozo, *The Nature of the Judicial Process*, 147 (1926). Between the two legal tender decisions of *Hepburn* v. *Griswold*, 8 Wall. (75 U.S.) 603, and *Knox* v. *Lee*, 12 Wall. (79 U. S.) 457, "[m]ost courts in a spirit of realism have held that the operation of the statute has been suspended in the interval", Cardozo, *ibid.* With a criminal conviction here at issue, and scienter a prerequisite, equal considerations apply to one who, before *Barenblatt*, relied on *Watkins*.

The "bad purpose" necessary to provide criminal intent cannot exist under these circumstances. *United States* v. *Murdock*, *supra*, 290 U. S. at 394.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed with directions to grant petitioner's motion for a judgment of acquittal.

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Appendix A

2 U. S. C. Section 192, 52 Stat. 942, is as follows:

"Refusal of witness to testify

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month or more than twelve months."

Public Law 601, Section 121, 79th Congress, 2d Session, 60 Stat. 828 and House Resolution 5 of the 84th Congress is as follows in pertinent part:

"(b) Rule XI of the Rules of the House of Representatives is amended to read as follows:

"RULE XI

"*Powers and Duties of Committees*

"(1) All proposed legislation, messages, petitions, memorials, and other matters relating to the subjects listed under the standing committees named below shall be referred to such committees, respectively • • •

"Committee on Un-American Activities.

"(a) Un-American activities.

"(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

Appendix B

In Point III of this brief, we have argued that the questions directed to petitioner were asked not for any legislative purpose, but among other things (1) to retaliate against him for criticizing the Committee; (2) to "cite" the Emergency Civil Liberties Committee or the Southern Conference, (3) to expose the names of various individuals to publicity. In this appendix we have summarized evidence of public record but not in the record of this case, showing that such non-legislative inquiries are a regular practice of the Committee, not a rare departure from its usual activity.

A. The Committee has frequently stated that its purpose was to "expose" subversives.

On May 26, 1938, Congressman Martin Dies, in urging the adoption of H. Res. 282, 75th Cong., creating the Special Committee on Un-American Activities (the predecessor of the present standing Committee), said:

> "I am not in a position to say whether we can legislate effectively in reference to this matter, but I do know that exposure in a democracy of subversive activities is the most effective weapon that we have in our possession." (83 Cong. Rec. 7570)

The Committee hearings and reports are replete with statements by the Committee and its members to this effect. Some of this material is referred to in *Watkins* v. *United States*, 354 U. S. 178 (ftn. at p. 199) and in the dissent of Mr. Justice Black in *Barenblatt*, at page 163. The subject was discussed at considerable length in the petitioner's brief in *Watkins* at pages 39 to 52 thereof. See also the Joint Appendix in *Watkins* at pages 112 through 168. We shall refrain from listing additional instances of statements by the Committee that exposure constitutes its purpose; such evidence would be only

cumulative. The Committee has never concealed its aims[1] and hardly a hearing can be examined without producing additional statements duplicating in content those above referred to.

B. The Committee obtains the same information over and over again.

The Committee's practice in recalling the same witnesses several times is explicable only if its purpose is exposure. The Committee calls many witnesses for not one but for a series of appearances before it, frequently over a period of years, not because additional information is expected, but because additional exposure of "subversives" will result. This practice has been followed both with witnesses friendly to the Committee and with those hostile to it.

1. Perhaps the Committee's favorite witness in the past few years has been Irving Fishman.[2] He does not list names. Instead his testimony, which is substantially identical each time he testifies, relates to the Communist propaganda allegedly being imported into the United States.

John Lautner has also testified many times.[3] He remembers scores of names which he gives forth quite

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[1] Some of the publications of the Committee are titled to indicate this purpose. See, for example, Hearings entitled "Expose of the Communist Party of Western Pennsylvania", 81st Cong.; Hearings entitled "Expose of Communist Activities in the State of Massachusetts", 82nd Cong.

[2] He testified in the 84th Cong. at Washington, D. C. (p. 4693 ff); at Philadelphia (p. 5422 ff.); and in San Francisco (p. 6044 ff). In the 85th Cong. he testified at New Orleans (p. 70 ff); at New York (p. 253 ff); at Buffalo (p. 1534 ff); at Boston (p. 2174 ff); at Washington, D. C. (p. 2426 ff); at Atlanta (p. 2635 ff); and at Newark (p. 2788 ff). In the 86th Cong. he testified in Puerto Rico (p. 1618 ff).

[3] In the 84th Cong., in New York at p. 6178 ff, 6233 ff and 6338 ff; in the 85th Cong. in New York at p. 275 ff, 650, 800, 2493 ff; in Chicago at p. 485 ff; in Gary at p. 1958 ff.

freely." He also relates a hair-raising story concerning the circumstances of the termination of his connection with the Communist Party; a story which was first told at the trial in *United States* v. *Flynn*, 216 F. 2d 354, at 362. This story has now been told at Chicago and Gary. His testimony, like Fishman's, is substantially the same each time he gives it except that additional names are produced on each occasion.

Matthew Cvetic has testified on four occasions in the 81st Congress.[4] Barbara Hartle has testified twice in the 83rd Congress and twice in the 84th, each time listing many names.[5] As in the case of Lautner there is no apparent reason for calling any of the witnesses more than once (if at all) except to secure publicly the names of additional persons.

2. Witnesses hostile to the Committee are also frequently called more than once, of necessity under Committee awareness that additional information cannot be obtained. The result however, frequently is widespread publicity which serves the exposure purpose of the Committee. Thus, subpoenas were repeatedly issued to Steve Nelson, the respondent in *Pennsylvania* v. *Nelson*, 350 U. S. 497, and the petitioner in *Mesarosh* v. *United States*, 352 U. S. 1,[6] even though the Committee certainly does not expect to get any information from him. Sometimes a witness is called several times in conjunction with organizational

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[4] Hearings, House Committee on Un-American Activities, 81st Cong. at pp. 1195 ff, 2365 ff, 3007 ff and 3143 ff.

[5] Hearings, House Committee on Un-American Activities, 83rd Cong. 6055 ff, 6127 ff, 6629-6650; 84th Cong. 6946-6958, 7051-7053.

[6] Nelson was first called by the Committee in executive session on April 26, 1949 (Hearings, 81st Cong., p. 315). He was again called on June 8, 1949 (*ibid.*, p. 129 ff), and again on March 12, 1959 (Hearings, 86th Cong., p. 502 ff). He has given no testimony at any time.

problems of a trade union or other organization.[7] Sometimes witnesses are recalled because they are prominent in the field of entertainment and hence can be "exposed" more than once with profit to the committee.[8]

The Committee lists repeatedly in its indices, reports and publications the same individuals who at one time or another signed a petition supporting an alleged Communist cause or attended a meeting of an alleged Communist-front organization.[9] In this category is the Committee's "List of Signers of Statement Defending the Communist Party".[10] The statement is in fact an appeal to the President and Congress to protect only the constitutional rights of Communists.

C. The Committee calls witnesses knowing that they will rely upon the First or Fifth Amendments.

The Committee knows or is in a position to know whether or not the prospective witness will answer questions. Its sources are any prior Committee testimony by the witness,[11] interviews between the witness and the Com-

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[7] For example, Leon Beverly, a leading officer of the United Packinghouse Workers, was called by the Committee in September, 1952, and recalled in May, 1959, both at times of considerable crisis in his union. Hearings, 82nd Cong., p. 3773 ff, 3774; 86th Cong., p. 562 ff, and see p. 516.

[8] For example, Elliott Sullivan, an actor in New York, was called twice in a period of two weeks in the summer of 1955. Hearings—House Committee on Un-American Activities, 84th Cong., 1383-1393, 2325-2348.

[9] See, *e.g.*, the Committee's "Cumulative Index to Publications," 1938-1954, and the Supplement of 1955-1956, and the massive documentation entitled "Communist Political Subversion, Part 1" and "Communist Political Subversion, Part 2".

[10] Communist Political Subversion, Part 2, p. 7188.

[11] See notes *ante* re Nelson, Beverly, Sullivan.

mittee's staff, correspondence with the witness,[12] and whether or not a witness has sought to communicate with the staff after being subpoenaed. If the Committee has any doubt, it may summon the witness to an executive session.

Notwithstanding such sources of knowledge, the Committee subpoenas the witness for a public hearing even where the witness has had an executive session in which he has declined to answer questions.[13] Or transcripts of testimony taken in executive session at which witnesses have refused to reply are made public,[14] occasionally long after the testimony was given.[15] Such actions can have no purpose other than exposure.

D. The Committee calls witnesses publicly despite its knowledge of the facts secured from hearings in executive session or reports on them by informers.

The Committee calls witnesses to public hearings even though it has secured full information from them in executive sessions where they testified freely or in reports secured from other committee witnesses or Government agencies. It often appears from the hearing itself that a full list of names was supplied by the witness in executive

[12] Miss Lillian Hellman, Pulitzer Prize playwright, advised the Committee that she would assert her constitutional privilege if the Committee insisted upon questioning her with respect to other people. Nevertheless it called her publicly. Emerson & Haber, 1 Political and Civil Rights in the United States, 2d Ed., 737.

[13] Hearings, 85th Cong., p. 726.

[14] *Ibid.*, pp. 1903-1951.

[15] *Ibid.*, 1937 ff.

session.[16] The only purpose in repeating the list in open session is to secure publicity for and hence exposure of the persons alleged to be Communists.

E. The Committee's principal interest is in names.

The hearings conducted by this Committee purport to investigate Communist activities on the theory that they involve threats to national security. See *United States* v. *Josephson*, 165 F. 2d 82, 87-88, cert. den. 333 U.S. 838, *reh. den.* 333 U. S. 858. Nevertheless, the Committee prefers Communist "names" to Communist activities. It calls for names from witnesses who completely lack knowledge of the Communist Party's present activities.[17]

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[16] The following testimony in 1957 from a witness who had left the Communist Party in 1948 (Hearings, 85th Cong., p. 1506) is typical:

"Mr. Arens: Now during the course of your membership in the Communist Party did you know a number of people as Communists who were engaged in the communications field?

Mrs. Greenberg: I did.

Mr. Arens: Have you conferred with myself and with other members of the staff with reference to the facts as you have known them?

Mrs. Greenberg: Yes, sir.

Mr. Arens: Do you have before you now a list of names of persons that you have given to the staff here, persons known by you to a certainty to have been members of the Communist Party?

Mrs. Greenberg: I have.

Mr. Arens: As to each of these persons, have you served with him or her in a closed Communist Party meeting?

Mrs. Greenberg: I have.

Mr. Arens: Would you kindly tell us the name of each of these persons, and give us just a word of description concerning each one of them." (85th Cong., p. 1510)

The witness then proceeded to list the names previously given to the Committee.

[17] No less than ten witnesses called in 1957-1958 had left the Communist Party prior to 1941. Hearings, 85th Cong., pp. 414 ff, 762 ff, 824 ff, 833 ff, 880 ff, 1410 ff, 1432 ff, 1448 ff, 1455 ff, 1461 ff.

A witness who admits that he once was a Communist is pressed to name other persons similarly situated, and if he refuses, the Committee recommends his citation for contempt.[18]

It is common knowledge that Communist Party membership and prestige are at their lowest ebb. Stouffer, *Communism, Conformity and Civil Liberties* (1955); Shannon, *Decline of American Communism* (1957); Ginzberg, *Rededication to Freedom* (1959). The public revelation of the names of one-time Communists, invariably known to other Governmental investigative agencies as well as to the Committee, would not appear to be a legislative function.

F. The Committee's legislative work is minimal.

The Committee has considered an infinitesimal number of bills in its lifetime.[19] Virtually all the legislative work

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[18] Many of the recalcitrant witnesses against whom the Committee has secured contempt citations have answered all Committee questions except as to the names of other persons (Watkins v. United States, 354 U. S. 178; United States v. Miller, 259 F. 2d 187; United States v. Silber, App. D. C. No. 15,779 (1960); United States v. Ingerman, pending D. C. N. D. N. Y.; United States v. Turoff, pending D. C. N. D. N. Y.).

[19]

Bills referred to House Committee on Un-American Activities		Total Number of Bills Referred to House Committees
83rd Cong. 1st Sess.	1	5471
83rd Cong. 2nd Sess.	3	4814
84th Cong. 1st Sess.	1	6580
84th Cong. 2nd Sess.	0	5876
85th Cong. 1st Sess.	4	9599
85th Cong. 2nd Sess.	1	3922

Source: Library of Congress, Legislative Reference Service, Digest of Public General Bills, Final Issues for 1953, 1954, 1955, 1956, 1957 and 1958. See also, Cumulative Index of Congressional Committee Hearings, (74th Cong. through 85th Cong.) (G.P.O., 1959) pp. 704-709.

which the Committee asserts it is considering or for which it claims credit is the responsibility of the Judiciary and the Foreign Affairs Committees.[20]

The Committee's disinterest in legislation is apparent too from the character of the testimony before it. Congressional committees concerned with the legislative process depend principally upon the expert testimony of Government officials and private groups who analyze the proposed legislation and make their recommendations to the Congress. All this is done without use of the subpoena power. The contrast between this Committee's hearings on passports in 1956 and 1958 and the hearings of the House Committees on Foreign Affairs and the Judiciary demonstrates this point.[21] The latter Committees examined high Government officials with the duty of presenting testimony to Congressional committees. The Un-American Activities Committee took *pro forma* testimony from the Administrator of the Bureau of Security and Consular Affairs and then proceeded to examine American citizens then or previously engaged in litigating their right to travel.

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[20] See the Brief of *amicus curiae* Davis, et al. submitted in support of petition for rehearing in *Barenblatt* v. *United States*, *supra*; see also Calendars of the U. S. House of Representatives and History of Legislation, 85th Cong., Final Edition (G.P.O. 1959), re H. R. 3, p. 113; H. R. 13272, p. 179; H. R. 13760, p. 181; compare the 1958 Annual Report of the Committee, H. Rep. 187, 86th Cong., 1st Sess., pp. 88-95.

[21] Compare hearings before subcommittee No. 1, House Committee on the Judiciary, 84th Cong., 2d Sess. on H. R. 9991, *U. S. Passports, Denial and Review* (May 10 and 28) with Hearings before Committee on Un-American Activities, 84th Cong., 2d Sess. and *Investigation of the Unauthorized Use of United States Passports* (May 23-25, 1956, p. 4303 ff; June 12-14, 21, 1956, p. 4597 ff). Congressman Walter presided over both sets of hearings. Compare Hearings before the Committee on Foreign Affairs, 85th Cong., 2nd Sess. and H. R. 13760 (July and Aug. 1958) and 86th Cong., 1st Sess. on H. R. 9096 (Aug. 1959) with Hearings before the Committee on Un-American Activities, 86th Cong., 1st Sess. on *Passport Security*, p. 569 ff.

The Committee did conduct hearings which led to the passage in 1950 of the Internal Security Act.[22] The contrast between the expert testimony adduced at those hearings and the testimony it usually adduces is a marked one. An occasional exercise in the legislative process is insufficient to justify the overruling of constitutional rights over two decades.

G. The Committee conducts hearing on matters *sub judice*.

The passport hearings, *supra*, illustrate another Committee tendency—to conduct hearings with respect to matters which at the time are *sub judice*. In each such case its principal witnesses are persons who have matters pending before administrative or court agencies which will be determined by pending litigation. A few additional examples follow:

There is now pending before this Court the petition for certiorari in *Borrow* v. *Federal Communications Commission*, Oct. Term 1960, No. 403, involving the right of the Federal Communications Commission to impose a loyalty test upon applicants for the renewal of radio licenses. In August, 1960 the Committee subpoenaed a number of other persons with pending applications before the Commission which are awaiting a decision in *Borrow*.[23] The Committee was in possession of copies of their applications before the Commission.

Similarly the Committee has conducted hearings on the Coast Guard's screening of merchant seamen and marine radio operators [24] despite the pendency of litigation,

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[22] H. Rep. 1844, 80th Cong., 2d Sess., see pp. 3-4.

[23] Press release of Committee Chairman Walter, August 23, 1960; 106 Cong. Rec., No. 140, p. D706. Hearings not yet printed.

[24] 106 Cong. Rec., No. 102, June 6, 1960, p. D510. Hearings not yet printed.

Graham v. *Richmond,* 272 F. 2d 517, and *Homer* v. *Richmond,* App. D. C. No. 15,751 (1960).

In each case the Committee evidently secured from the government licensing agency the names of the persons engaged in administrative proceedings and proceeded to examine them as to their political backgrounds. If the determination as to the desirability of legislation were the objective, that was accomplished by the testimony of the agencies' representatives. The compulsory testimony of the citizen litigants served the function of exposure. In addition, it is difficult to blind oneself to the possibility of its effect on the pending cases.

H. Hearings are conducted on subjects outside the Committee's jurisdiction and in the face of the hearings and reports of other committees.

A Committee's practice in conducting hearings upon matters outside its jurisdiction is further evidence that its purpose is something other than legislation.

The Committee has an unusual record in this respect. It conducts hearings on passports, see *supra,* page 58, in the face of hearings by the Committee which has unmistakable jurisdiction over the matter. One subject of its Atlanta hearings was the proposed amendment of the Smith Act (see *Yates* v. *United States,* 354 U. S. 298) which was before the Judiciary Committee, H. R. 13272, 85th Cong.; see H. Rep. 2495, 85th Cong. Another subject at Atlanta was an additional proposed amendment to the Smith Act dealing with supersession (R. 26, 92; see *Pennsylvania* v. *Nelson,* 350 U. S. 497). The bill on supersession, H. R. 3, had been reported out by the Judiciary Committee as H. Res. 597 on June 15, 1958, H. Rep. 1878, 85th Cong., and had passed the House on July 17, 1958, 104 Cong. Rec. 14161, nearly two weeks prior to the Atlanta hearings.

1. Publicity is a prime Committee function.

The writings of the Committee show that its principal function is in the field of publicity. It has the largest committee staff and appropriations. It prints more copies of its hearings and reports than all the other committees together.[25] These reports customarily have nothing to do with legislation but consist of attacks against organizations and persons of whom the Committee disapproves, such as *Report on the National Committee to Defeat the Mundt Bill*, H. Rep. 3248, 81st Cong., 2nd Sess.; and *Review of the Methodist Federation for Social Action*, 82nd Cong., 2nd Sess., H. Rep. 1661. Only recently it supported the scandalous charge that Communists had infiltrated the Protestant clergy. *New York Times*, Feb. 19, 1960, p. 1, col. 6.

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[25] The basic appropriation for this Committee has risen from $125,000 (H. Res'ns 168, 624, 79th Cong.) to $654,000 (H. Res'ns 137, 413, 86th Cong.). In addition, it secured special permission to print its publications in unusually large amounts, e.g.:

Resolution, Congress, Year	*Amount*	*Publication*
H. Con. Res. 52 81.1 1949	250,000	100 Things You Should Know About Communism in the U.S.A.
H. Con. Res. 98 82.1 1951	65,000	Guide to Subversive Organizations and Publications
H. Con. Res. 99 82.1 1951	500,000	100 Things You Should Know About Communism
H. Res. 220 85.1 1957	60,000	Guide to Subversive Organizations and Publications

In contrast to a total absence of special printing authorizations for the important Judiciary and Foreign Affairs Committees, the House Committee has secured such authorizations as 1,500,000 copies (H. Con. Res. 52, 81st Cong., 1st Sess.), 540,000 (H. Con. Res. 98, 99, 82nd Cong., 1st Sess.) and 84,500 (H. Res'ns 168, 169, 170, 187, 228, 258, 86th Cong., 1st Sess.).

These reports for the most part have nothing whatsoever to do with legislation. They interfere directly with the exercise of First Amendment rights. One such report, *Communist Political Subversion*, contains an attack upon the American Committee for the Protection of Foreign Born which has been responsible for the representation in the courts of many aliens facing deportation (H. Rep. 1182, 85th Cong. 1st Sess.). Another report entitled *Communist Legal Subversion, the Role of the Communist Lawyer* (86th Cong. 1st Sess., Feb. 16, 1959) is an attack upon members of the Bar active in civil liberties cases.

The quantity of the reports and their titles are indicative of their purpose. Between 1938 and 1958, the Committee has issued about ninety reports and other publications (other than transcript of hearings) comprising about 10,000 pages. In only a handful of these is any legislation recommended or even discussed. The other reports are devoted exclusively to exposure. Their most prominent feature consists of lists of names of persons and organizations.

Some of these reports are devoted to specific individuals or organizations (Dr. Edward U. Condon,[26] the Methodist Federation for Social Action,[27] the National Lawyers Guild,[28] the Hawaii Civil Liberties Committee,[29] the Emergency Civil Liberties Committee,[30] etc.). Others are devoted to more general subjects. Typical is the 97-page Committee report issued August 16, 1957, entitled *Communist Political Subversion, The Campaign to Destroy the Security*

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[26] March 18, 1948, 80th Cong.

[27] *Supra*. p. 61.

[28] H. Rep. 3123, 81st Cong., 2nd Sess.

[29] H. Rep. 2986, 81st Cong., 1st Sess.

[30] *Operation Abolition, supra*.

Program of the United States Congress. No legislation is recommended. The index to the report contains the names of about 350 individuals and another 250 organizations mentioned in it; some of them are the subject of extensive biographical comment.

Most of the Committee's reports are accompanied by an index of names alone. When the Committee prints its hearings, the print is accompanied by an index of names, not subjects.

The Committee's most voluminous publication is its *Cumulative Index to Publications of the Committee on Un-American Activities, 1938-1954* and the Supplement to that index covering the years 1953 and 1956. It too is actually an index to names. The 1938 to 1954 index contains the names of about 30,000 individuals and several thousand organizations; the Supplement contains approximately 12,000 names. Each of these individuals and organizations has been "mentioned" in a House Committee hearing or report. Anyone interested may, with the aid of these reference works, determine whether his employees, his fellow-workers, his union officials, his neighbors, his personal enemies or, for that matter, a Justice of his Supreme Court, have ever been referred to at a Committee hearing, and on what occasion.

The Committee also publishes a *Guide to Subversive Organizations and Publications* which, like the index, publicly lists those organizations disapproved of by the Committee.

These publications are utilized by federal, state and local officials in their own search for "subversive" persons. Echoes of these indices occur frequently in the records of this Court and the Courts of Appeal. For example, one of the charges against Greene was that he attended a dinner of an organization cited by the House Committee as a Communist front; one of the charges against Harmon was

that he was a member of an organization cited by the Committee (*Greene* v. *McElroy*, 360 U. S. 474, n. 5 at p. 478; *Harmon* v. *Brucker*, 355 U. S. 579, R. 3-4). Olenick received an undesirable discharge from the Army because, among other things, he read a newspaper "cited" by the Committee as a mouthpiece of the Communist Party (*Olenick* v. *Brucker*, 273 F. 2d 819, J.A. p. 8a). Additional instances of such use of Congressional Committee "citations" can be found in the file of most loyalty-security proceedings, whether they be of seamen being screened by the Coast Guard, soldiers being screened by the Army, defense employees being screened by the Industrial Personnel Screening Board, federal employees being screened by federal loyalty boards, municipal employees being screened by various state, county or local screening agencies, or members of the public being screened by the Passport Office.[31]

The Committee does not treat its processes of compiling the index as incidental; indeed it has even, as here, called witnesses for the express purpose of determining whether or not it should "cite" an organization as a "Communist front" (R. 110, 133, see *supra*, p. 7).

Nor is the material which the Committee publishes the full extent of its activity in this area. In its 1947 Annual Report, the Committee said:

> "The Committee during the past two years, has assembled an exhaustive file on every known subversive individual and organization at work in the United States today. The Committee's system of cross-indexing, filing and master-filing is considered one of the outstanding systems of this type in the

[31] See, *e.g.*, Association of the Bar of the City of New York, *The Federal Loyalty-Security Program* (1956), p. 86; affidavit of Frances G. Knight, Director of the Passport Office, filed May 24, 1956, p. 28 A of Joint Appendix in *Stewart* v. *Dulles*, 248 F. 2d 602.

United States. The files of the Committee are used daily as sources of information by practically every investigative division of the Federal Government" (H. Rep. 2742, 79th Cong., 2nd Sess., p. 16).

As Professor Carr says: "Every time such a person makes a speech, publishes a book or article, lends his name as sponsor to some organizational activity which is reported in the press or otherwise comes to the attention of the committee staff *and seems significant to them*, another entry is added to the card file." (Carr: The House Committee on Un-American Activities, Cornell University Press, 1952, p. 254. Emphasis in original.) Professor Carr estimates that there may have been, in 1952, index cards on a million individuals. If so, there are, no doubt, many more by this time.

Robert Stripling, sometime Chief Investigator of the Committee, is quoted as having stated that about 20,000 persons had access to the files (Carr, *supra*, 256). Files cannot be kept confidential if so many persons are privy to them. The Committee makes no secret of the non-legislative use of its files. On August 21, 1959, Congressman Walter, Chairman of the Committee, publicly announced in calling off a proposed hearing on the subject of education in Southern California, that he was turning over information in the files of the Committee to the local school authorities for action.[32] With respect to an apparently similar practice concerning petitioner, see *supra*, p. 4, n. 1.

[32] The New York Times, Aug. 22, 1959, p. 15, col. 1.